80-780

Supreme Court, U.S.
FILED
NOV 14 1980
MICHAEL RODAK, JR., CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN COMPANIES, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR CERTIORARI

K. MARTIN WORTHY
MICHAEL C. DURNEY

HAMEL, PARK MCCABE & SAUNDERS
1776 F Street, N.W.
Suite 400
Washington, D.C. 20006
(202) 785-1234

ELMER H. THEIS

1102 Walnut Bend
Houston, Texas 77042
(713) 497-0774

Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether meals and lodging furnished without charge to employees for the convenience of their employer, and therefore admittedly not "wages" subject to withholding for Federal income tax purposes, are nonetheless "wages" subject to Social Security (FICA) and Federal Unemployment Insurance (FUTA) taxes.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	5
I. The Decision Of The Court Below Conflicts With Recent Decisions Of This Court, Of The United States Courts Of Appeals For The Fourth And Seventh Circuits, And Of The United States Court Of Claims	5
A. The decision admittedly conflicts with decisions of the Fourth and Seventh Circuits and the Court of Claims	5
B. The decision below conflicts with the decision of this Court in *Central Illinois* rejecting a broad and sweeping definition of "wages" for employment tax purposes.	8
C. There is no basis for the conclusion of the court below that special "latitude" was given the Treasury to promulgate regulations defining "wages" differently for FICA and FUTA tax purposes than for purposes of income tax withholding and that, because of the Treasury's pronouncements meals and lodging furnished for convenience of the employer must be treated as "wages" for FICA and FUTA purposes.	10
II. Resolution Of The Conflict Is Of Importance To Both The Government And Thousands Of Taxpayers.	24
CONCLUSION	24
APPENDIX A	1a
APPENDIX B	13a
APPENDIX C	14a

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES

CASES: PAGE

Central Illinois Public Service Co. v. *United States,* 435 U.S. 21 ..... 5, 6, 7, 8, 9, 10, 17, 21

Commissioner v. *Kowalski,* 434 U.S. 77 11

Harris Trust & Savings Bank v. *United States,* Ct. Cl. No. 105-79T 20

Hotel Conquistador, Inc. v. *United States,* 597 F.2d 1348 ..... 6, 7, 9, 21, 24

National Muffler Dealers Association v. *United States,* 440 U.S. 472 19

Oscar Mayer & Co. v. *United States,* 623 F.2d 1223 ..... 5, 9

Pacific American Fisheries v. *United States,* 138 F.2d 464 5

Royster Co. v. *United States,* 479 F.2d 387 ..... 5, 7, 9

S.S. Kresge Co. v. *United States,* 279 F.2d 309 5

Social Security Board v. *Nierotko,* 327 U.S. 358 ..... 17, 18

United States v. *Correll,* 389 U.S. 299 ..... 18, 23

STATUTES AND REGULATIONS:

Current Tax Payment Act of 1943 (57 Stat. 126) Sections 1621-1632 13

Revenue Act of 1918 (40 Stat. 1057) Section 213 10

Internal Revenue Code of 1939 (56 Stat. 884) Sections 465-470 13

Internal Revenue Code of 1954 (26 U.S.C. 1971 ed.)

Section 162(a)(2) 23

Section 119 ..... 13, 15

Section 3101 ..... 2, 6

Section 3102 ..... 2, 6

Section 3111 ..... 2, 6

Section 3121 ..... 2, 6

Table of Authorities Continued

STATUTES AND REGULATIONS:	PAGE
Section 3301	2, 6
Section 3306	2, 6
Section 3401	2, 6
Section 3402	2, 6
Section 7805	16
Social Security Act (49 Stat. 636)	12
Section 808	16
Section 908	16
Treasury Regulations on Employment Tax (26 C.F.R.)	
Section 31.3121(a)-1	2
Sections 31.3121(a)-1(f)	11, 16
Sections 31.3121(a)-1(h)	22, 23
Sections 31.3306(b)-1	2, 11
Sections 31.3306(b)-1(f)	16
Sections 31.3306(b)-1(h)	22, 23
Sections 31.3401(a)-1	2
Sections 31.3401(a)-1(b)(2)	22
Treasury Regulations 45, Art. 33	10
Treasury Regulations 90, Art. 207	12, 13, 18
Treasury Regulations 91, Art. 14	11, 13
Treasury Regulation 106, Section 402.227 (1940 ed.)	11, 18
Treasury Regulation 107, Section 403.227 (1940 ed.)	11, 18
Treasury Regulations 115, Section 404.101	15
MISCELLANEOUS:	
Cong. Rec. S12367 (daily ed. Aug. 2, 1979)	14
H.R. Rep. No. 268, 78th Cong., 1st Sess. 14 (1943)	14

Table of Authorities Continued

MISCELLANEOUS:	PAGE
H.R. Rep. No. 510, 78th Cong., 1st Sess. 14 (1943)	20
H.R. Rep. No. 1337, 83d Cong., 2d Sess. A324-325 (1954)	16
H.R. 12841, 95th Cong., 2d Sess., Section 4	13
Mim. 5657, 1944 Cum. Bull. 550	15, 18
O.D. 265, 1 Cum. Bull. 71 (1919)	11
O.D. 514, 2 Cum. Bull. 90 (1920)	11, 12
Rev. Rul. 54-497, 1954-2 Cum. Bull. 75	23
Rev. Rul. 57-471, 1957-2 Cum. Bull 630	13, 15
Rev. Rul. 62-150, 1962-1 Cum. Bull. 213	15, 18
Rev. Rul. 75-168, 1975-1 Cum. Bull. 58	23
Rev. Rul. 75-432, 1975-2 Cum. Bull. 60	23
Rev. Rul 76-71, 1976-1 Cum. Bull. 308	22, 23
Rev. Rul. 80-41, 1980-7 I.R.B. 14	24
S. Rep. No. 1631, 77th Cong., 2d Sess. 166 (1942)	14, 19
S. Rep. No. 221, 78th Cong., 1st Sess. 17 (1943)	14
S. Rep. No. 1622, 83d Cong., 2d Sess. 484 (1954)	16
S.S.T. 110, 1937-1 Cum. Bull. 440	12, 13, 18
S.S.T. 192, 1937-2 Cum Bull. 449	12, 18
S.S.T. 302, 1938-1 Cum. Bull. 456	12, 13, 15, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. ____

ROWAN COMPANIES, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Rowan Companies, Inc. ("Rowan"), respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 22, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 624 F.2d 701, is reproduced in its entirety as Appendix A, *infra*, [1a — 12a]. The order reviewed below, of the United States District Court for the Southern District of Texas, issued without opinion and not reported, is reproduced in its entirety as Appendix B, *infra*, [13a].

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 3101, 3102, 3111, 3121, 3301, 3306, 3401 and 3402 of the Internal Revenue Code of 1954 (26 U.S.C. (1971 ed.)), and of Treasury Regulations on Employment Tax §§31.3121(a)-1, 31.3306(b)-1 and 31.3401(a)-1, (26 C.F.R.) are set forth in Appendix C, *infra*, 14a — 18a.

STATEMENT

This action was brought by the petitioner, Rowan Companies, Inc. ("Rowan"), in the United States District Court for the Southern District of Texas, under 28 U.S.C. §1346, for refund of FICA and FUTA taxes alleged to have been wrongfully assessed and collected from Rowan by the Internal Revenue Service.

The essential facts are undisputed. During the years in issue — 1967, 1968, and 1969 — Rowan owned and operated a number of land-based and off-shore oil and gas drilling rigs. (R.1-2,5,30,56,99,109-111;[1] Appendix A, *infra*, 2a.) It operated its land-based rigs with a crew which normally worked six days a week on a seven or eight-hour shift, with each man going home at the end of his shift each day (R. 94). By contrast, Rowan's off-shore rigs were operated up to sixty miles off shore; it was not practical for the off-shore crews to leave at the end of each shift and consequently two crews were kept

[1] "R." references are to the record on appeal.

at the rig at all times, with each crew working a twelve-hour shift for ten consecutive days; every five days one of the crews went ashore for five days off and meanwhile a new crew came to the rig (R. 197,63-64, 79-80,94, 136; App. A, *infra*, 2a — 3a). Because of the cost of transporting crews to and from shore at the start and end of each shift, lodging at the rig and three meals a day at the rig cafeteria style were provided at Rowan's expense for each crew member for each of the ten days he remained at the rig (R. 67,80,83, 112, 119,139-140,146-147,190,193; App. A, *infra*, 2a). Each member of each crew was furnished a meal before and after his shift and a third meal on a staggered basis in the middle of his shift (R. 150-151). The cost to Rowan of providing transportation ashore at the beginning and end of each shift — typically two hours in and two hours back — would have been $275 to $350 per day for each crew or roughly $25 per man, as compared to a cost to Rowan of about $6 per day per man for providing such meals and such lodging at the rig (R. 146-147, 190,193, 38). When a crew was off duty, its members were not expected to perform any services, nor was a crew member expected to assist in any work at his own mealtime (R. 153-154, 193).

Rowan's employees were not unionized and there was no agreement with them individually or collectively to furnish food and lodging (R. 100,142,193; App. A, *infra*, 2a). The type of food and lodging furnished was the same for all crew members, irrespective of pay scale, and for all employees of other employers working on the drilling rig (with reimbursement to Rowan by such employers) (R. 193;40,84,99-100,108-111; App. A, *infra*, 2a). They got no cash allowances if they refused such meals or lodging and Rowan was not obligated to fur-

nish transportation to and from shore except at the time of crew changes (R. 146-147, 193; App. A, *infra*, 2a). No meals or lodgings were provided to crew members during their off duty days and they had to obtain meals and maintain regular lodging ashore at their own expense.

Although paid substantially the same cash wages, crew members on Rowan's land-based rigs, who went home each day, were not furnished meals or lodging (R. 94,63-64,71-72).

Rowan did not include the value of meals and lodging furnished the off-shore employees in computing an employee's wages for purposes of income tax withholding or FICA or FUTA tax purposes.

The Government concedes that such off shore meals and lodging were furnished for the convenience of taxpayer as an employer and accordingly do not constitute "wages" subject to income tax withholding (App. A, *infra*, 3a). Nevertheless, the Government asserts that the meals and lodging are "wages" for FICA and FUTA tax purposes, and it assessed a deficiency against Rowan based on including a fair market value of $6 per day per man for such meals and lodging in the base for withholding employee FICA tax and computing employer FICA and FUTA tax (R. 2,5, 19-21,38; App. A, *infra*, 3a). Rowan paid such taxes and thereafter, after filing timely claim, filed this suit for refund of such taxes.

The district court granted a Cross-Motion for Summary Judgment filed by the Government, and the court below affirmed.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Below Conflicts With Recent Decisions Of This Court, Of The United States Courts Of Appeals For The Fourth And Seventh Circuits, And Of The United States Court Of Claims

A. The decision admittedly conflicts with decisions of the Fourth and Seventh Circuits and the Court of Claims

The court below recognizes that its decision is directly contrary to the recent decisions of the United States Court of Appeals for the Fourth Circuit in *Royster Co.* v. *United States,* 479 F.2d 387 (1973), and the United States Court of Appeals for the Seventh Circuit in *Oscar Mayer & Co.* v. *United States*, 623 F.2d 1223 (1980), holding "that the term 'wages' has the same essential meaning in the [income tax] withholding, FICA and FUTA tax statutes." App. A, *infra*, 8a, 11a.[2]

---

[2] The court below purports to follow *S.S. Kresge Co.* v. *United States*, 379 F.2d 309 (C.A. 6th, 1967) and *Pacific American Fisheries* v. *United States,* 138 F.2d 464 (C.A. 9th, 1943). It must be noted, however, (1) that irrespective of what was stated in those cases as to the "convenience of employer" test being inapplicable to meals and lodging for FICA and FUTA purposes, such statements are *dicta* since in each case it was specifically found that the meals in those cases were not furnished as a convenience to the employer, but as compensation for specific work done (*Kresge,* 379 F.2d at 310; *Pacific American Fisheries*, 138 F.2d at 466) — making such cases clearly distinguishable on the facts from the instant case, and (2) that, as noted by the Court of Claims in *Conquistador*, whatever precedential value such statements may have had, they are, in any event, no longer viable as precedents in the light of this Court's subsequent decision in *Central Illinois Public Service Co.* v. *United States,* 435 U.S. 21 (1978), discussed at pp. 8 — 10, *infra*, specifically rejecting a broad and sweeping definition of "wages" for employment tax purposes.

The court below also recognizes that its decision is contrary to the recent decision of the Court of Claims in *Hotel Conquistador, Inc.* v. *United States,* 597 F. 2d 1348 (1979), *cert. denied*, 444 U.S. 1032, 100 S. Ct. 702, 62 L. Ed. 2d 668 (1980), that cafeteria meals furnished hotel employees for the convenience of the employer were not "wages" for FICA and FUTA tax purposes. App. A, *infra*, 11a.

The Internal Revenue Code imposes four different forms of "employment tax": (1) income tax withholding required of employers under Section 3402; (2) employee income tax under the Social Security Act (FICA) required to be withheld by employers under Sections 3101 and 3102;[3] (3) employer excise tax under the Social Security Act (FICA) payable by employers under Section 3111; and (4) employer excise tax (FUTA), payable by employers under Section 3301. All four employment taxes are imposed on "wages". App. C, *infra* 14a — 16a.

"Wages" are defined by statute for income tax withholding purposes in Section 3401 as "all remuneration . . . for services performed by an employee for his employer," and — as admitted by the court below (App.

---

[3] The court below twice erroneously refers to the FICA tax on employees and employers alike as an "excise" tax. App. A, *infra*, 3a, 4a. Section 3101(a) and (b) specifically imposes FICA tax "on the income" of employees, as contrasted to Section 3111 (a) and (b) which specifically refers to the imposition of "an excise tax" on employers. In view of this Court's determination in *Central Illinois, supra,* that the concept of "wages" is narrower than that of "income" (435 U.S. at 25, 29-31), and the obvious Congressional intent that the employer FICA and FUTA excise taxes be imposed on the same base as the employee FICA income tax (26 U.S.C. §3121, 3306), it would seem clear that if meals and lodging are not income, they necessarily are not "wages" for purposes of any of the employment taxes.

A, *infra*, 4a (fn. 3), 6a) — defined in essentially identical terms for FICA and FUTA tax purposes in Sections 3121 and 3306 as "all remuneration for employment." (App. C, *infra*, 15a). For over 60 years, meals and lodging furnished employees for the convenience of the employer have been recognized as not being "remuneration for services" and therefore not "wages" for income tax purposes.[4]

Immediately prior to and during the pendency of this case *the Government* repeatedly recognized the identity of the meaning of the term "wages" for all employment tax purposes. After specifically referring to the statutory definition of "wages" for FICA, FUTA and income tax withholding purposes, the Government told the Fourth Circuit on brief in *Royster, supra*, — which involved all four employment taxes — that:

> "In view of the similarity of these definitions we agree with the District Court's conclusion . . . that the term 'wages' has the same meaning for all of the employment taxes involved." Gov't Brief, p. 6.

The Fourth Circuit agreed, holding that meal reimbursements there involved were not subject to income tax withholding, FICA, or FUTA tax. 479 F.2d at 390.

Then, when the FICA and FUTA tax were before the Court of Claims in *Conquistador*, and the Government was seeking to rely on the decision of the Seventh Circuit in *Central Illinois Public Service Co.* v. *United States*, 540 F.2d 300 (1976), later reversed by this Court, 435 U.S. 21 (1978), the Government advised the Court of Claims:

> "Because the term 'wages' has the same meaning under all the employment taxes, [the decision of the

---

[4] See pp. 10-11, *infra*.

> Court of Appeals in *Central Illinois,* involving income tax withholding on meal reimbursements] is squarely in point here." (Emphasis added).[5]

And, even in the instant (*Rowan*) case, the Government originally told the court below that *Central Illinois*, as "then pending before the Supreme Court . . . involved 'the same, substantially the same or related issues' as those involved in the present appeal."[6]

B. The decision below conflicts with the decision of this Court in *Central Illinois* rejecting a broad and sweeping definition of "wages" for employment tax purposes.

In *Central Illinois* this Court two years ago rejected the Government's argument that lunch payments of $1.40 per meal received by employees pursuant to a collective bargaining agreement negotiated by the employees' union were "wages" so as to be subject to income tax withholding. 435 U.S. at 29. There, as here:

> "The employee on travel status rendered no service to the Company during his lunch. He was off duty and on his own time. He was subject to call, however, as were all employees at any time as emergencies required. The lunch payment was unrelated to the employee's specific job title, the nature of his work, or his rate of pay. '[T]his lunch payment arrangement was beneficial and convenient for the company and served its business interest. It saved the company employee time otherwise spent in travelling back and forth as well as the usual travel expenses.' " 435 U.S. at 23.[7]

---

[5] Gov't Brief in support of Cross-Motion for Summary Judgment, p. 22, fn. 8.

[6] Gov't Motion for Extension of Time, March 28, 1978, p. 1.

[7] See pp. 22-23, *infra.*

The Government had contended that since the "payments at issue were a result of the employment relationship and were a part of the total of the personal benefits that arose out of that relationship," they necessarily constituted "wages." *Id.* This Court rejected such "expansive and sweeping definition of wages," finding it to be inconsistent with the Congressional purpose of setting forth a standard "intentionally narrow and precise." 435 U.S. at 31. This Court emphasized that the tax base is limited to "wages" and that such term is limited by the withholding statute to mean "all remuneration . . . for services performed by an employee for his employer," 435 U.S. at 29, essentially the identical language of the FICA and FUTA statutes.[8]

While recognizing the essential identity of statutory language and even acknowledging that "the factors considered in *Central Illinois Public Service* apply here as well," the court below refused, in light of a purportedly consistent contrary Government interpretation of the FICA and FUTA statutes[9], to apply *Central Illinois* in the instant case. (App. A, *infra*, 10a — 12a.) In view of the Government's repeated acknowledgement of the identity of the issues, and recognition by the Seventh Circuit[10] and the Court of Claims[11] of the applicability

---

[8] In reversing the Seventh Circuit in *Central Illinois*, this Court followed the earlier view of *Royster, supra*, 435 U.S. at 31. Although reaching a different conclusion than *Royster* as to whether meal reimbursements were subject to tax, the Seventh Circuit had itself agreed in *Central Illinois* with *Royster* that "wages" has the same meaning for FICA, FUTA and withholding tax purposes. 540 F.2d at 302, fn. 2.

[9] The Government has actually not been consistent, having changed its interpretation of the FICA and FUTA statutes at least five times. See fn. 18, *infra*.

[10] *Oscar Mayer & Co.* v. *United States*, 623 F.2d at 1225-28.

[11] *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d at 1351-52, 1354.

of *Central Illinois* to FICA and FUTA tax determinations, the failure of the court below to follow such decision is in error.

C. There is no basis for the conclusion of the court below that special "latitude" was given the Treasury to promulgate regulations defining "wages" differently for FICA and FUTA tax purposes than for purposes of income tax withholding and that, because of the Treasury's pronouncements meals and lodging furnished for convenience of the employer must be treated as "wages" for FICA and FUTA purposes.

Repeated Administrative and Judicial Recognition that Meals and Lodging for the Convenience of the Employer Are Not Wages or Income. Although income tax withholding was not adopted until 1942, meals and lodging furnished to employees for the convenience of their employer have been consistently regarded as noncompensatory in nature and therefore not income[12] for purposes of income tax. Thus, even though the Revenue Acts as early as 1918 specifically defined income as including "wages . . . of whatever kind and in whatever form paid" (Section 213, Revenue Act of 1918, 40 Stat. 1057), the regulations and rulings issued by the Bureau of Internal Revenue as early as 1918 directly recognized that such term did not include the value of "board" or "living quarters . . . furnished to employees for the convenience of the employer." Reg. 45, Art. 33 (1918);

---

[12] This Court noted significantly in *Central Illinois* that "wages" is a narrower term than "income". 435 U.S. at 25, 29-31.

O.D. 265, 1 Cum. Bull. 71 (1919); O.D. 514, 2 Cum. Bull. 90 (1920). This principle was repeatedly reiterated by the Government in rulings and regulations in the 1920's, 1930's, and 1940's and — as recently pointed out by this Court in *Commissioner* v. *Kowalski,* 434 U.S. 77 at 88, fn. 21 (1978) — also received during this period the repeated approval of the courts. Finally, in 1954 the rule was codified (as it exists today) in Section 119 of the Code, with the added requirement, however, that in order to be excluded, such meals must be furnished on the business premises of the employer.

Vacillation by the IRS for FICA and FUTA Purposes. The Government has, nevertheless, from time to time, as in this case, ruled that such meals and lodging are wages within the meaning of the FICA and FUTA statutes, and the court below relied on Regulation 106, Section 402.227, and Regulation 107, Section 403.227, issued in 1940 (and now codified as §31.3121(a)-1(f) and 31.3306(b)-l). Such regulations contained identical language on this point, which, after providing that "facilities or privileges" furnished employees do not ordinarily constitute remuneration for employment, stated:

> "The term 'facilities or privileges,' however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees."

Contrary, however, to the emphasis placed by the court below on such rulings and regulations and its suggestion that such "interpretations [having] long continued without substantial change" they should be followed by the courts (App. A, *infra,* 4a — 5a, 10a — 11a), the

Government has *not* consistently construed the FICA and FUTA statutes or regulations as requiring taxability of meals such as are here involved.

Immediately after the enactment of the Social Security Act in 1935 (49 Stat. 636), the Treasury in 1936 promulgated Regulation 90, Article 207 (relating to the FUTA tax) providing that:

> "Ordinarily, facilities or privileges (such as . . . cafeterias, restaurants . . .), furnished or offered by an employer to his employees generally, are not considered as remuneration for services if such facilities or privileges are offered or furnished by the employer merely *as a convenience to the employer* or as a means of promoting the health, good will, contentment, or efficiency of his employees." (Emphasis added.)

This contemporary interpretation of the statute is, of course, precisely the position now taken by Petitioner.

In 1937, the then Bureau of Internal Revenue issued S.S.T. 110, 1937-1 Cum. Bull. 440, holding "supper money" paid an employee who worked overtime for the convenience of the employer as not constituting "wages" for purposes of what are now referred to as FICA and FUTA taxes.[13] S.S.T. 192, 1937-2 Cum. Bull. 449, was later issued in 1937 and provided that lunches served employees could constitute "wages" for FICA and FUTA purposes. However, this ruling was revoked the next year by S.S.T. 302, 1938-1 Cum. Bull. 456, which

---

[13] It is important to note that the Bureau cited as authority for its FICA decision in S.S.T. 110 its previous income tax ruling, O.D. 514, 2 Cum. Bull. 90, issued in 1920, which held that "supper money" furnished under such conditions did not represent taxable income to an employee for income tax purposes.

held that, if furnished for the convenience of the employer, such meals would not constitute "wages" for FICA and FUTA tax purposes,[14] citing as authority Reg. 90, Art. 207, *supra*; Reg. 91, Art. 14, *supra*; and S.S.T. 110, *supra*.

Legislative Intent that the Tax Base be the Same for All Employment Taxes. The Victory Tax provisions of the Revenue Act of 1942 (56 Stat. 884) added to the Internal Revenue Code of 1939, Sections 465 to 470 (effective from January 1 to June 30, 1943), and the Current Tax Payment Act of 1943 (57 Stat. 126) added to the Code Sections 1621-1632 (effective on a permanent basis July 1, 1943), requiring employers to withhold income tax due on "wages" paid their employees.

In doing so, the Congress expressed a clear intent to adopt as a definitional base for withholding of income tax the identical base previously adopted for Social Security taxes.[15] After noting that income tax

---

[14] The holding in S.S.T. 302 that FICA and FUTA taxes would not apply referred to the following facts:

> The M Company has now established that the free lunch privileges are afforded solely to promote its own interests; that the wage scale of its employees has not been lowered to reflect the value of such items; that the lunches are not furnished as additional compensation for services; that such lunches are voluntarily offered to the employees; and that the lunches are furnished for the convenience of the M Company, and benefit the company by promoting the health, good will, and efficiency of its employees.

All of these circumstances apply here.

[15] The understanding of the Congress that the base is the same for all employment taxes was reiterated as recently as 1978 when Section 119 was amended so as to make clear that the exclusion applies to meals furnished an employee for the convenience of the employer, although the employer imposes a partial charge for the meal. H.R. 12841, 95th Cong., 2d Sess., Section 4, enacted into law as P.L. 95-427. In answer to a specific inquiry on the floor of the

withholding (like the FICA and FUTA tax) was to be imposed on "wages", the report on the Victory Tax stated that:

> "*With certain specified exceptions*, the term is defined to include all remuneration whether designated as salary, wages, fees, commissions, etc., and whether paid in cash or property, if paid for services performed by an employee for his employer . . . *[t]hese exceptions are identical with the exceptions extended to such services for Social Security tax purposes and are intended to receive the same construction and have the same scope.*" (Emphasis added.) S. Rep. No. 1631, 77th Cong., 2d Sess. 166 (1942).

In extending income tax withholding the next year, the Committee reports stated

> "The general definition of the term 'wages' contained in section 465(a) is the same as that contained in existing law." H.R. Rep. No. 268, 78th Cong., 1st Sess. 14 (1943).
>
> * * *
>
> "The general term 'wages' contained in section 1621(a) is the same as that contained in the House bill and in section 465(a) of the code." S. Rep. No. 221, 78th Cong., 1st Sess. 17 (1943).[16]

Senate as to the effect of the bill on "income tax withholding, social security (or FICA) tax, and unemployment (or FUTA) tax," Senator Long, Manager of the bill containing the amendment, responded that it was understood that "an item excluded from gross income will also be excluded from the definition of 'wages' for all payroll tax purposes." (Cong. Rec. S12367 (daily ed. Aug. 2, 1978)). Astonishingly, the court below cites Senator Long's statement as indicating an awareness by "some members of the Cop-ngress" that the FICA and FUTA regulations interpreted "wages" differently than the regulations applicable to income tax withholding. App. A, *infra*, 10a (fn. 10).

[16] That these were deliberate decisions of the Congress to simplify recordkeeping by taxpayers, and administration by the Government, see pp. 19—21, infra.

The Internal Revenue Service almost immediately issued Regulation 115, Section 404.101, providing that:

> "If . . . living quarters or meals are furnished to an employee for the convenience of the employer, the value thereof need not be included as wages subject to withholding."

This was, of course, long before the "convenience of the employer" rule was codified in Section 119. Such contemporaneous interpretation of this particular employment tax statute is highly significant.

Despite such clear Congressional understanding that the term "wages" was to be construed alike for purposes of all employment taxes, Mim. 5657, 1944 Cum. Bull. 550, was issued in 1944 holding that although meals served employees for the convenience of their employers were not "wages" for withholding tax purposes, such meals would be regarded as "wages" for FICA and FUTA tax purposes.

Further Vacillation by the IRS. The treatment of employee meals was even further confused by the issuance in 1957 of Revenue Ruling 57-471, 1957-2 Cum. Bull. 630, which, in an unsuccessful attempt to reconcile S.S.T. 302, *supra*, and the applicable regulations, held that although meals served employees of a *bank* or *trust company* for the convenience of the employer would *not* constitute "wages" for FICA and FUTA purposes (see S.S.T. 302, *supra*), meals served employees of *food preparation establishments* (such as hotels, restaurants or cafeterias) for the convenience of their employers would constitute "wages" for FICA and FUTA tax purposes. Five years later, the Internal Revenue Service issued Revenue Ruling 62-150, 1962-1 Cum Bull. 213, which revoked S.S.T. 302, *supra*, stating, without explanation, the principle on which it now relies that, although the

convenience of the employer test continued to be applicable for income tax purposes, it was "no longer" a test for FICA and FUTA tax purposes. All of these changes in position by the Treasury occurred during a period in which there was no change by the Congress in the applicable statutes.

Limited Significance of Regulations §§31.3121(a)-1(f) and 31.3306(b)-1(f). The court below found that Regulations §§31.3121(a)-1(f) and 31.3306(b)-1(f), holding meals and lodging to be subject to FICA and FUTA tax, "were adopted pursuant to express statutory authority", implying that such regulations are "legislative" in nature (rather than merely interpretative) and should be given special weight by the courts. App. A, *infra*, 4a — 5a, 9a. However, the Government's authority to issue regulations is derived from Sections 808 and 908 of the Social Security Act which have now been incorporated in Section 7805 of the 1954 Code without any change in meaning or scope. H.R. Rep. No. 1337, 83d Cong., 2d Sess. A324-A325 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 484 (1954). Section 7805 provides authorization for the issuance of "all needful rules and regulations for the enforcement of this Title" (i.e., Title 26, the entire Internal Revenue Code). The authority thus given to the Treasury Department by the Congress to issue regulations with respect to the Social Security taxes is no different, and no broader, than the interpretative regulation authority of the Treasury Department with respect to the Internal Revenue laws in general.

The court below says in its opinion:

> "We are not engaged in a Socratic dialogue to determine whether all things bearing the same name are alike but in deciding to what extent Congress

> purposely limited the authority of the administrative agency by the use of these words in a consistent pattern. *** Resolution of the issue does not turn on how we would, without further guidance, interpret the words, but on whether the construction reached by the Secretary is a permissible one." App. A, *infra*, 9a.

In *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946), this Court had before it a similar assertion that the Government had the ability to determine by regulation what was or was not "wages" for Social Security tax purposes. In refusing to accept the Government's attempt to define the word "wages" as having a meaning different from that ordinarily understood by such term, this Court observed that under the Social Security Act, contrary to the view of the Court below, the validity of regulations issued under the Act was specifically reserved for judicial determination. *Id.* at 368. Of specific relevance to the instant case is the following statement by this Court:

> "Administrative determinations must have a basis in law and must be within the granted authority. Administration when it interprets a statute so as to make it apply to particular circumstances acts as a delegate to the legislative power. . . . Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. Except as such interpretative power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function. Congress used a well understood word — 'wages'[17] — to indicate the receipts which were given to govern taxes and benefits under the Social Security Act." 327 U.S. at 369.

---

[17] A word "intentionally narrow and precise." *Central Illinois, supra*, 435 U.S. at 31.

In determining whether back-pay awards were "wages" for computing benefits under the Social Security Act, this Court referred as authority to the definition of "wages" for *income tax* withholding. 327 U.S. at 366 (fn. 17).

In any event, the Government has changed its published positions on the treatment as FICA and FUTA "wages" of meals served for the convenience of the employer no less than *five* times, notwithstanding the absence of any change whatsoever in the applicable statutes.[18] The regulations and rulings interpreting the statute and regulations rulings are inconsistent and for that reason alone fail the test of "continuity without substantial change" regarded by this Court as essential in order that they be considered as having congressional approval and the effect of law. *United States* v. *Correll*, 389 U.S. 299, 305-06 (1967), cited by the court below, App. A, *infra*, 10a — 11a. Off and on for approximately 26 years, from the issuance in 1938 of S.S.T. 302, *supra*, until its revocation without explanation in Rev. Rul. 62-150, *supra*, the Government specifically recognized the convenience of the employer test as being applicable to a determination of FICA and FUTA wages. Against this background, the interpretation *now* put on the statute by the Government is entitled to no greater weight than the position of any litigant.

---

[18] Compare Regulations 90, Article 207 (1936) (meals for the convenience of the employer not treated as wages); S.S.T. 110, 1937-1 Cum. Bull. 440 (same); S.S.T. 192, 1937-2 Cum. Bull. 449 (such meals treated as wages); S.S.T. 302, 1938-1 Cum. Bull. 456 (such meals not treated as wages); Regulations 106, §402.227, and Regulations 107, §403.227 (1940) (such meals "ordinarily" treated as wages); Mim. 5657, 1944 Cum. Bull. 630 (such meals served bank employees not treated as wages, such meals served other employees treated as wages); and Rev. Rul. 62-150, 1962 Cum. Bull. 213 (meals generally treated as wages).

Moreover, as recently noted by this Court in *National Muffler Dealers Association* v. *United States*, 440 U.S. 472 at 488 (1979), judicial acceptance of a regulation or the commissioner's interpretation of it is dependent upon a showing that it " 'implement[s] the congressional mandate in some reasonable manner' . . .". This the current regulation fails to do.

The court below says that:

> "*Absent some indication of a different congressional intention*, it does not appear inconsistent with the purposes of FICA and FUTA to consider meals and lodging of appreciable value remuneration whether or not they are furnished for the employer's benefit and are not considered to be compensation to the employee for income tax purposes." App. A, *infra*, 5a — 6a. (Emphasis added.)

But here there is a strong indication of congressional intention that "wages" be construed identically, rather than differently for all employment tax purposes. See pp. 13 — 15, *supra*.

When income tax withholding first came in, it was stated that the tax base — "wages" — was intentionally the same as that of the FICA and FUTA tax in order to:

> "simplify the process of collection at the source and help to minimize the requirements for additional business machines by employers charged with the duty of collecting and accounting for the tax." S. Rep. No. 1631, *supra* (1942), at 171.

The court below says that:

> "Ease of administration and uniformity of interpretation, even if not icons, merit consideration. Yet most businesses *today* utilize computers to calculate taxes and it is a simple matter to devise a program that includes some items for one or two taxes and excludes the same items in calculating others." App. A, *infra*, 11a. (Emphasis added.)

This Court should take judicial notice of the fact that in the taxable years here involved — 1967, 1968, and 1969 -- far fewer employers had computers to calculate taxes than *today*, and many still do not. But, more important, there were no computers for calculating taxes in 1942 when Congress deliberately chose the same word "wages" as the base for all employment taxes; whether Congress would have made the same decision today is irrelevant in light of the fact that it has never seen fit to overturn that decision, and its intent in enacting the statute should be given primary weight in applying the statute.

It should also be observed that great difficulty will often be encountered in determining the value of meals and lodging, placing an extremely heavy burden on the employer if it is to be fair to its employees in determining the amounts on which the employee FICA tax must be withheld and the employer FICA and FUTA taxes paid. Again, in describing income tax withholding, the Conference Report in 1943 said in referring to the bill which Congress adopted:

> "The methods of collection, payment, and administration of the withholding tax were coordinated generally with those applicable to the Social Security tax imposed on employees under section 1400 of the code. This proposal was made in order to facilitate the work of both the Government and the employer in administering the withholding system." H.R. Rep. No. 510, 78th Cong., 1st Sess. (1943), at 28.[19]

---

[19] In *Harris Trust & Savings Bank* v. *United States*, now pending in the Court of Claims (Docket 105-79T), the Government contends that, even though the employer charged for meals in its company cafeteria, FICA and FUTA tax are due on a purported excess in value of the meals over the charges. The difficulty of determining

Furthermore, even if a regulation interpreting "wages" were to be given some particular weight, the Court of Claims has found that "as a guide to employers in their relations with employees, the existing regulation is nearly worthless." 597 F.2d at 1354. This Court pointed out in *Central Illinois* that

> "Because the employer is in a secondary position as to liability for any tax of the employee, it is a matter of obvious concern that, absent further specific congressional action, the employer's obligation to withhold be precise and not speculative." 435 U.S. at 31.

The Court of Claims in *Conquistador* found that

> "[The regulation prescribes that] as regards food and lodging furnished without charge, they are not 'wages' unless they are 'renumeration,' and the regulation admits that not all food and lodging benefits are 'remuneration.' Only 'ordinarily' and 'generally' they are. . . . The employer who concludes subjectively that his free meals are not 'remuneration,' will not find anything in the regulation to tell him whether he is right or wrong on the particular facts of his case. . . . The employer has no way of telling whether or not his plan is the ordinary or general case, except language that seems to intimate the regulator is thinking of rather massive benefits. . . . The concluding part of the quoted regulation would tell him to compare the food or lodging benefits with the 'total remuneration,' but he is not told what ratio will trigger a classification one way or the other; *i.e.*, what part the regulator deems an 'appreciable' part." 597 F.2d at 1353-54.

---

such excess in withholding FICA tax from particular employees when some employees eat entirely different items and entirely different quantities than other employees, some bring their own lunches, and some eat differently some days than others, would be enormous.

The uncertainty engendered by such language has been intensified by the fact that the Government has changed its published position on the subjectibility of meals served for the convenience of the employer to FICA and FUTA taxes no less than five times, notwithstanding the absence of any change since 1940 in the applicable regulation. The court below was clearly in error in relying on the 1940 regulations, particularly in light of repeated narrower interpretation by the courts and the Internal Revenue Service of the word "wages" in the income tax and income tax withholding areas and the enunciation of a clear Congressional intent that the rules be the same for all employment tax purposes.

Other FICA and FUTA Regulations in Point: §§31.3121(a)-1(h) and 31.3306(b)-1(h). There is another reason why the court below reached the wrong conclusion in this case. It overlooked other FICA and FUTA regulations which provide:

> "Amounts paid specifically — either as advances or reimbursements — for traveling or other bona fide working and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages." FICA Regulation §§31.3121(a)-1(h). FUTA Regulation §31.3306(b)-1(h).

The income tax withholding regulation is identical (§31.3401(a)-1(b)(2)).

In Revenue Ruling 76-71, 1976-1 Cum. Bull. 308 at 310, the Service has said that expenses incurred directly by an employer which, if paid by his employees would be deductible by such employees as ordinary and necessary travel expenses, "are not 'wages' for purposes of Federal employment taxes," specifically including

FICA, FUTA and income tax withholding. Under Section 162(a)(2) of the Internal Revenue Code a deduction is allowed for

> "[T]raveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in pursuit of a trade or business."

In justifying deductions under this section for expenses overnight, this Court has pointed out that "the statute speaks of 'meals and lodging' as a unit," and that an employee gains only limited benefit from such expenses if he must also maintain a home for his family at his own expense even when he is absent on business." *United States* v. *Correll*, 389 U.S. 299 at 304-05. The principle of allowing a deduction (or exclusion if the expense is paid directly by the employer) is particularly applicable here where as a matter of practical necessity, an employee working offshore, cannot return home at night until his 10-day tour ends, but must nevertheless in the meantime, maintain living quarters on shore available for use between tours. See, in this connection, Revenue Rulings 54-497, 1954-2 Cum. Bull. 75; 75-432, 1975-2 Cum. Bull. 60, and 75-168, 1975-1 Cum. Bull. 58, applying such principle to railroad employees eating and sleeping aboard trains and truck drivers on long-haul overnight trips. Thus, the meals and lodging furnished Rowan's offshore employees are excluded from "wages" for FICA and FUTA tax purposes by Regulations §31.3121(a)-1(h) and §31.3306(b)-1(h) and Revenue Ruling 76-71, *supra*, — regardless of what the regulations relied on by the court below might seem to say.

II. Resolution Of The Conflict Is Of Importance To Both The Government And Thousands Of Taxpayers.

We are advised by the Government that there are currently several hundred cases pending at administrative levels or in the courts in which the Government is contending that meals and lodging admittedly not subject to income tax withholding because furnished for the convenience of the employer, are nevertheless subject to FICA and FUTA tax. The Government has indicated in Revenue Ruling 80-41, 1980-7 I.R.B. 14, that, despite such cases as *Conquistador*, it will continue to insist that employers withhold and pay such tax — presumably until the matter is resolved by this Court.

CONCLUSION

For these reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

K. MARTIN WORTHY
MICHAEL C. DURNEY
HAMEL, PARK, MCCABE & SAUNDERS
1776 F Street, N.W.
Suite 400
Washington, D.C. 20006
(202) 785-1234

ELMER H. THEIS
1102 Walnut Bend
Houston, Texas 77042
(713) 497-0074

Counsel for Petitioners

APPENDIX A

ROWAN COMPANIES, INC.,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 77-3044

United States Court of Appeals
Fifth Circuit.

Aug. 22, 1980.

Appeal from the United States District Court for the Southern District of Texas.

Before RUBIN and POLITZ, Circuit Judges, and SMITH* District Judge.

ALVIN B. RUBIN, Circuit Judge:

The Federal Insurance Contributions Act (FICA) and the Federal Unemployment Act (FUTA) both use the simple word "wages" to designate the base for the taxes imposed. The taxpayer contends that the Secretary of the Treasury may not by regulation define that word to include the value of meals and lodging furnished in kind by an employer for his own benefit to employees away from home overnight. The fact that the regulation has been in force for forty years, the purpose of the statutes and the method of their administration convince us that the Secretary has not exceeded his authority. We, therefore, affirm the district court's summary judgment for the government.

---

* District Judge of the Northern District of Mississippi, sitting by designation.

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1980, by WEST PUBLISHING CO.

The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

I.

Rowan contracts with other firms to drill oil and gas wells both on land and beneath the offshore waters. When drilling offshore, Rowan moves its rig to the owner's location, as much as sixty miles from land. Each rig is operated by a drilling crew. Crews vary in size depending on the type of rig and may include from four to twelve persons. Each off-shore rig operates twenty-four hours a day, manned by two crews, each working twelve hours. Members of each crew remain offshore for a fixed period, known as a tour of duty, usually ten days, when they are provided transportation to shore and a period of leave, usually five days. When their new tour is to commence, Rowan provides transportation to the offshore location.

Because of the cost of transporting crews to and from land at the start and end of each shift, Rowan hires caterers to provide meals and maintain living quarters for crews working offshore. Eating facilities, sleeping quarters and lounge areas used for leisure activities while a crew is off duty are usually located on a vessel moored alongside the drilling platform.

The decision to afford these services was reached unilaterally by Rowan for its own economic reasons without either individual or collective bargaining.[1] Identical meals and facilities are provided to all employees regardless of their status or rate of pay. An employee who for any reason does not elect to eat meals furnished does not receive an allowance in lieu of them.

---

[1] In the district court the IRS contended both that Rowan furnished these services under an implied contract and that the value of the services constituted wages as a matter of law, even in the absence of such a contract. Because the implied contract issue was disputed, the IRS contended summary judgment for Rowan was inappropriate. Before us the government no longer argues that there was an implied contract but urges only that the value of the meals and lodging constitutes wages as a matter of law.

Rowan did not include the value of meals and lodging in computing an employee's income in order to determine either the amount to be reported as income earned by the employee on the W-2 form, the amount to be withheld from wages for income tax purposes or the base on which to calculate the amount to be paid by it for FUTA purposes and by it and the employee for FICA purposes.

The Internal Revenue Service added the fair market value of meals and lodging to the tax base for FICA and FUTA taxes and assessed a deficiency in employer taxes for 1967, 1968 and 1969. The taxes were not assessed on the value of transportation to and from work, which was also furnished by Rowan.Rowan paid the deficiency and sues for refund. The IRS concedes that these benefits are not income on which the employee must pay income tax, and that as a result of a 1978 Supreme Court decision, they are not the subject of withholding. The IRS likewise does not challenge Rowan's position that it furnished these services for its own convenience.

II.

The Federal Insurance Contributions Act, which was adopted in 1935[2] imposes upon employers and employees alike a tax based on "wages," I.R.C. §§ 3101, 3111, currently at a rate of 6.13% on all wages up to $25,900 annually. The proceeds of this tax are used to defray the cost of the social security program. The Federal Unemployment Tax Act, also adopted in 1935, imposes a tax on employers based on "wages" paid to employees, I.R.C. § 3301. The proceeds of this tax are used to defray the cost of the federal unemployment conpensation program. In 1943, Congress adopted the Current Tax Payment Act, requiring employers to withhold income taxes in an amount based on employees' "wages," I.R.C. § 3402.

---

[2] While the Act has been amended a number of times, the basis for the tax imposed and the purpose of the excise tax has never been altered.

The term "'wages" is defined by both FICA, I.R.C. § 3121(a), and FUTA, I.R.C. § 3306(b), as meaning "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash."[3] In enacting the social security taxes, Congress manifested its intent to impose the excise on a wide range of employer-furnished remuneration. The Committee Reports state that wages include compensation for services paid in any form, such as room or board. H.R.Rep. No. 615, 74th Cong., 1st Sess. 3, 1939—2 C.B. 600, 606; S.Rep. No. 628, 74th Cong., 1st Sess. 49, 1939—2 C.B. 611, 620).[4]

Beginning in 1937, the Secretary began issuing rulings interpreting each statute to include in wages meals and lodgings furnished specific types of employees.[5] In a more general

---

[3] The definition of "wages" for withholding purposes is substantially identical. See I.R.C. §3401(a).

[4] This legislative history from 1935 was not included in the IRS Cumulative Bulletin until 1939.

[5] Immediately after the enactment of the Social Security Act in 1935, the Treasury promulgated Regulation 90, Article 207 (1936) (dealing with FICA), which provided, "The medium in which the remuneration is payable is . . . immaterial. It may be payable in cash or in something other than cash such as goods, lodging, food and clothing." Article 207 also excluded the value of the use of facilities such as cafeterias furnished by an employer for its convenience, as did Article 14 of Regulation 91 (dealing with FUTA), but neither dealt generally with the broader subject of meals and lodging.

In 1937 these regulations were interpreted to require a sorority house to pay FICA and FUTA taxes on the value of free meals and lodging furnished to college students who lived or worked at the sorority house, S.S.T. 96, 1937-1 C.B. 439, and the value of board and lodging furnished to student nurses was held to constitute wages for social security purposes, S.S.T. 149, 1937-1 C.B. 380. In 1938, the value of food and lodging furnished to employees of a sanitarium, located in a remote geographical area where the employees had to remain constantly on duty, was ruled social security "wages" under the Regulations. S.S.T. 321, 1938-2 C.B. 323. *See also* S.S.T. 386, 1940-1 C.B. 211 (declaring the value of

regulation promulgated in 1940, he excluded from wages facilities or privileges of relatively small value furnished employees by the employer but included meals or lodging furnished "for example, to restuarant or hotel employees, or to seamen or other employees aboard vessels since generally these items constitute an appreciable part of the total remuneration of such employees." No mention was made of the convenience of the employer. Treas.Reg. 106 § 402.227 (FICA); Treas.Reg. 107 § 403.227 (FUTA). This provision was carried substantially unchanged into the 1951 regulations, Treas.Reg. 128 § 408.226, and into the 1956 regulations issued pursuant to the 1954 Code, Treas.Reg. §§ 31.3121(a)—1(f), T.D. 6190, 1956—2 C.B. 605, 619 (FICA), Treas.Reg. §§ 31.3306(b)—1(f), T.D. 6199, 1956—2 C.B. 721, 740 (FUTA). The regulations issued in 1956 remain in effect today.

[1] These regulations were adopted pursuant to express statutory authority. *See* I.R.C. § 7805(a). If they are reasonable and consistent with the statutory authorization, they may not be overturned. *Thor Power Tool Co.* v. *Commissioner,* 439, U.S. 522, 533 n.11, 99 S.Ct. 773, 781 n.11, 58 L.Ed.2d 785, 796 n.11 (1979); *Anderson, Clayton & Co.* v. *United States,* 562 F.2d 972, 976 n.6 (5th Cir. 1977), *cert. denied,* 436 U.S. 944, 98 S.Ct. 2845, 56 L.Ed.2d 785 (1978); *Kramertown Co.* v. *Commissioner of Internal Revenue,* 488 F.2d 728, 730 (5th Cir. 1974).

Absent some indication of a different congressional intention, it does not appear inconsistent with the purposes of FICA and FUTA to consider meals and lodging of appreciable value remuneration whether or not they are furnish-

---

food and lodging furnished to seamen aboard ships to be "wages" for social security purposes); S.S.T. 110, 1937-1 C.B. 440 (which treated "supper money" paid to an employee who worked overtime by his employer "for the convenience of the employer in having the overtime service of the employee" as not constituting "wages" for purposes of FICA and FUTA); S.S.T. 192, 1937-2 C.B. 449, providing that free lunches served employees constitute "wages" for FICA and FUTA purposes.

ed for the employer's benefit and are not considered to be compensation to the employee for income tax purposes. Thus, the validity of the regulations was upheld in *Pacific American Fisheries* v. *United States*, 138 F.2d 464 (9th Cir. 1943). In 1962 Rev.Rul. 62-150, 1962-2 C.B. 213, declared that all worktime free meals representing an appreciable part of the remuneration of the employees, regardless of the nature of the business or the convenience of the employer, were subject to FICA and FUTA taxes. This position that was upheld in *S.S. Kresge Co.* v. *United States*, 218 F.Supp. 240 (E.D.Mich., 1963), and *S.S. Kresge Co.* v. *United States*, 379 F.2d 309 (6th Cir. 1967), although those cases rely in part on the existence of a *quid pro quo* nexus between the giving of free meals and the receipt of employee services as justification for treating the value of the meals as "wages." Their logic is not, however confined to that situation.

Doubt arises not from any provision of FICA or FUTA but from the interpretation given the term "wages" in another tax statute. In 1943, Congress adopted the pay-as-you-go tax plan, still substantially in force, the Current Tax Payment Act of 1943, 57 Stat. 126. That act required employers to withhold income tax from "wages". The statute not only used that term but defined it in words that are, for present purposes identical to those used in FICA and FUTA.[6] However, in the same year, the Secretary adopted regulations excluding from wages for withholding purposes "living quarters or meals . . . furnished to an employee for the convenience of the employer . . . ." Treas.Reg. 115, §404.101. Thus, under the regulations, the criterion of taxability of meals and lodging under FICA and FUTA was whether the benefits amounted to an appreciable part of wages while the test for withholding was whether they were furnished for the employer's convenience, however large the value.

---

[6] "[A]ll remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash." I.R.C. §1621(a).

This conflicting interpretation of the same word used in three statutes and defined by indistinguishable definitional phrases was confirmed without explanation in Rev.Rul. 1944-7-11685, Mim. 5357, 1944 C.B. 550. Yet a rationale is not difficult to surmise. The purpose of withholding is to set aside the amount needed for income tax. If income tax is not due on some payments to employees, it is unnecessary to withhold taxes from these payments.

Section 213 of the Revenue Act of 1918, 40 Stat. 1057, 1063, defined income as including "salaries, wages or compensation for personal service[s] . . . of whatever kind and in whatever form paid." The convenience of the employer doctrine arose in 1919, when the Treasury recognized that board and lodging furnished seamen in addition to their cash compensation is supplied for the convenience of their employer and that its value is not a part of the employee's income. O.D. 265, 1 C.B. 71. The convenience of the employer principle has been followed consistently in determining taxable income. *See* O.D. 514, 2 C.B. 90 (1920) (supper money furnished for extra work after hours is considered paid for the employer's convenience and is not taxable income); O.D. 814, 4 C.B. 84 (1921) (lodging and sustenance furnished employees engaged in fishing and canning); Treas.Reg. 111 §29.22(a)-3 (1939 Code). In 1954, Congress codified a major part of this interpretation of the income tax statute, limiting, however, the exclusion from gross income[3] to meals furnished on the employer's business premises and lodging that the employee is required to accept as a condition of his employment.[4] 26 U.S.C. 119.

---

[3] The 1954 income tax statute defines income in extremely broad terms, imposing a tax on "income from whatever source derived . . . including wages, or compensation for personal service . . . of whatever kind and in whatever form paid." I.R.C. §61. It does not limit taxability to wages. *See Commissioner* v. *Kowalski*, 434 U.S. 77, 82-83, 98 S.Ct. 315, 319, 54 L.Ed.2d 252, 259 (1977).

[4] The amendment did not resolve the question of the taxability of other employer-furnished fringe benefits. In *Commissioner* v.

When the convenience of the employer exception for income tax purposes was codified, the Commissioner contemporaneously reiterated that this exception has no effect on the inclusion of the value of such benefits in the social security base. Rev.Rul. 54-593, 1954-2 C.B. 30, 31; accord, Rev.Rul. 71-411, 1971-2 C.B. 103, 105; Rev.Rul. 72-385, 1972-2 C.B. 535,538; Rev.Rul. 77-80, 1977-1 C.B. 36, 37 (value of free lodging furnished to religious leaders includable in the social security base even though exempt from income withholding taxes by reason of the section 119 "convenience of the employer" rules.)

The inconsistent definition of wages for withholding purposes, however, led to the argument that the more limited interpretation given the term used in the Current Tax Payments Act itself qualified the earlier definition used for FICA and FUTA. Thus, in *Royster Co.* v. *United States*, 479, F.2d 387 (4th Cir. 1973), the Fourth Circuit considered whether cash reimbursements to salesmen for the cost of their meals constituted wages for FICA and FUTA. Reasoning that these were not wages for withholding and that the term wages "has the same essential meaning," 479 F.2d at 390, in the withholding, FICA and FUTA tax statutes, the court held that they are not subject to the social security taxes. Similarly, the Seventh Circuit recently held that the difference between the cost to the employer of cars provided to employees for personal use and the amount the employees reimbursed the employer for that use was not wages, relying heavily on Royster.[9] *Oscar Mayer & Co.* v. *United States*, _____ F.2d _____, No. 79-1743 (7th Cir. June 20, 1980).

Kowalski, 434 U.S. 77, 98 S.Ct. 315, 54 L.Ed. 252 (1978), the court held that cash reimbursements to employees for meals consumed while on patrol duty constitutes income to the employees under section 61 and is not excludable under section 119. This still leaves some questions unresolved. *See* Resnik, *Meal Reimbusements as an Employee Fringe Benefit*, 10 Loy.L.Rev. 789 (1979).

[9] The court also relied on the absence of a "more specific" regulation clearly including the benefit within the definition of wages for FICA and FUTA purposes. Slip op. at 8726-8727, at _____.

The primary premise of these decisions appears to be semantic consistency. If so, it might with equal logic be argued that the Secretary's interpretation of wages under the withholding statute, coming as it did some years after the FICA and FUTA regulations, was the improper result. The inquiry is not, however, merely one of semantic comparison. The words, even if identical, are not components of an algebraic equation each side of which must inevitably yield the same result. We are not engaged in a Socratic dialogue to determine whether all things bearing the same name are alike but in deciding to what extent Congress purposely limited the authority of the administrative agency by the use of these words in a consistent pattern. This conclusion must be influenced by the purposes of the statutes, the uses made of their revenues and their relationship with other statutes. Resolution of the issue does not turn on how we would, without further guidance, interpret the words, but on whether the construction reached by the Secretary is a permissible one.

Federal income taxes are used for general expenditures. Withholding is a means to collect income taxes. FICA and FUTA taxes are collected for special purposes. They are not general revenue measures. The revenues are spent primarily to benefit the employees affected. The employer's obligation to withhold and pay FICA taxes and to pay FUTA taxes is primary whereas its obligation under the income tax provisions is secondary. If income tax is not withheld, the tax is still a debt of the wage-earner. If FICA or FUTA are interpreted to exclude an item, no revenue is produced.

These factors must be taken into account in weighing the applicability of the 1978 Supreme Court decision that an employer is not required to withhold taxes from cash reimbursement paid to employees for noon lunches while the employees are away from normal duty stations or on overnight trips. *Central Illinois Public Service Company* v. *United States,* 435 U.S. 21, 98 S.Ct. 917, 55 L.Ed. 2d 82 (1978). Rejecting the argument that, because the sums paid were taxable income, withholding was appropriate, the Court distinguished

between the broad definition of income in the income tax statute and the constrasting confinement of withholding to "wages" defined as "all remuneration (other than fees paid a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash." I.R.C. § 3401(a). The government argued that the reimbursements were part of the "total package of remuneration designed to attract and hold the employee to the company." 435 U.S. at 28, 98 S.Ct. at 921, 55 L.Ed. at 89. The Court labelled this conclusion "facile." Noting that the regulation excluded benefits afforded employees away from home overnight, it refused to countenance the inclusion of other meals in wages. *Cf. United States* v. *Correll*, 389, U.S. 299, 88 S.Ct. 445, 19 L.Ed.2d 537 (1967) (restricting to overnight trips the travel expense deduction for meal costs under I.R.C. §162(a)(2)). The Court concluded that the simplicity and ease of administration were the standards adopted by Congress in enacting withholding in 1942 and that these objectives had not since been changed. The Court thought it important that, absent further specific congressional action, the employer's obligation "be precise and not speculative." 435 U.S. at 31. 98 S.Ct. at 923, 55 L.Ed.2d at 91. Furthermore, because the Court was faced only with an attempt to apply retroactively a ruling imposing a tax on payments previously made, it did not decide the validity of regulation operating prospectively, as are these before us. See 435 U.S. at 32 n.12, 98 S.Ct. at 923 n.12, 55 L.Ed. at 91 n.12, and concurring opinion of Mr. Justice Brennan, joined by The Chief Justice and Mr. Justice Powell, 435 U.S. at 33-38, 98 S.Ct. at 923-26, 55 L.Ed. at 91-94.

The factors considered in *Central Illinois Public Service* apply here as well. Yet they do not decide that a purely prospective regulation, suffered for forty years by a Congress acutely attuned to tax considerations,[10] is invalid. "Treasury

---

[10] At least some members of Congress are aware of these regulations. *See* 124 Cong.Rec. S. 12367 (Daily ed. Aug. 2, 1978) (remarks of Sen. Long).

regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *United States* v. *Correll*, 389, U.S. 299, 305-306, 88 S.Ct. 445, 449, 19 L.Ed.2d 537, 543 (1967) (citing prior Supreme Court cases). Ease of administration and uniformity of interpretation, even if not icons, merit consideration. Yet most businesses today utilize computers to calculate taxes and it is a simple matter to devise a program that includes some items for one or two taxes and excludes the same items in calculating others.

(2) Considering these facts and the purposes served by FICA and FUTA, the latitude given the Secretary of the Treasury, and the difference in purpose between FICA and FUTA, on the one hand, and withholding and income taxes on the other, we are unable to agree with the rationale adopted by the Court of Claims in *Hotel Conquistador, Inc.* v. *United States,* 597 R.2d 1348 (Ct.Cl.1979), cert.denied, _____ U.S. _____, 100 S.Ct. 702, 62 L.Ed.2d 668 (1980), in holding that cafeteria meals furnished employees not away from home overnight were "not 'remuneration', therefore, not 'wages' " for FICA and FUTA. 597 F.2d at 1350.

The regulations before us are not without reason. The only appellate decisions restricting their scope are *Royster*, decided in 1973, *Hotel Conquistador*, decided in 1978, and *Oscar Mayer*, decided in 1980. While we are not unaffected by the pragmatic approach they represent, we believe that each proceeds largely on the thesis that the same words used in different statutes must mean the same thing and that, therefore, Congress intended to deny interpretative power to the Secretary. We are unable to subscribe to that conclusion.

Therefore, the judgment of the district court sustaining the validity of the FICA and FUTA regulations is AFFIRMED.[11]

---

[11] In Revenue Ruling 80-41, I.R.B. 1980-7, 14 (Feb. 19, 1980), the Internal Revenue Service stated:

> ISSUE
>
> In *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d 1980 (Ct.Cl.1979), *cert. denied*, January 14, 1980, the Court of Claims held that the value of certain meals furnished without charge to hotel and restaurant employees was not "wages" under sections 3121(a) and 3306(b) of the Internal Revenue Code.
>
> It is the long standing position of the Service that the value of meals furnished without charge, for example to hotel or restaurant employees, or to seamen or other employees aboard vessels, is wages under sections 3121(a) and 3306(b) of the Code. This position has been supported by the courts in *S. S. Kresge Co.* v. *United States*, 379 F.2d 309 (6th Cir. 1967), concerning free meals furnished to lunch stand employees, and *Pacific American Fisheries, Inc.* v. *United States*, 138 F.2d 464 (9th Cir. 1943), concerning the value of board and lodging furnished to salmon packing plant employees.
>
> For these reasons, the Service will not follow the decision of the United States Court of Claims in the *Hotel Conquistador* case, and employers must continue to treat the value of such free meals furnished to their employees as wages under sections 3121(a) and 3306(b) of the Code.

In a letter to this court, the IRS seeks to buttress its position on the thesis that the Social Security Administration is mandated by 42 U.S.C. §409 and §404.1026(a)(6) of the Social Security Regulations on Federal Old-Age Survivors and Disability Insurance, 20 C.F.R. §404.1026(a)(6) (1979), to compute social security benefits on a base that includes the value of employer furnished meals.

While in this case we came to the result favored by the IRS, we cannot do so on this basis for it is an evident non-sequitur: 42 U.S.C. §409 (the Social Security Act) defines wages as "remuneration." If meals and lodging provided by Rowan are not remuneration for computing FICA tax, they are equally not remuneration for computing social security benefits. If the one is an incorrect definition, so is the other. An error is not cancelled by being twice repeated.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

ROWAN COMPANIES, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 75-H-1818

Filed August 9, 1977

ORDER GRANTING DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

The cross motion of the defendant, United States of America, for summary judgment pursuant to Rule 56(c) of the Rules of Civil Procedure, having been presented, and the Court being fully advised,

The Court finds that the defendant, is entitled to a summary judgment as a matter of law.

It is, therefore, ORDERED, ADJUDGED, and DECREED by the Court that plaintiff shall recover nothing herein, that the complaint be dismissed with prejudice and that defendant recover its costs.

Dated July 27, 1977.

/s/ Robert O'Conor, Jr.
ROBERT O'CONOR, JR.
United States District Judge

APPENDIX C

APPENDIX C

Internal Revenue Code of 1954 (26 U.S.C.) (1971):

SECTION 3101. RATE OF TAX.

(a) *Old-Age, Survivors, and Disability Insurance* —

In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) —

* * *

(b) *Hospital Insurance* — In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) —

* * *

SECTION 3102. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement* — The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. . . .

* * *

SECTION 3111. RATE OF TAX.

(a) *Old-Age, Survivors, and Disability Insurance* —

In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b)) —

(b) *Hospital Insurance* — In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b)) —

* * *

SECTION 3121. DEFINITIONS.

(a) *Wages* — For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; . . .

* * *

SECTION 3301. RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1970 and each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.2 percent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

* * *

SECTION 3306. DEFINITIONS.

(b) *Wages* — For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; . . .

* * *

SECTION 3401. DEFINITIONS.

(a) *Wages* — For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee

for his employer, including the cash value of all remuneration paid in any medium other than cash; . . .

* * *

SECTION 3402. INCOME TAX COLLECTED AT SOURCE.

(a) *Requirement of Withholding* — Every employer making payment of wages shall deduct and withhold upon such wages (except as otherwise provided in this section) a tax determined in accordance with the following tables. . . .

* * *

Treasury Regulations on Employment Tax (1954 Code) (26 C.F.R.) (1971):

§31.3121(a)-1 *Wages.*

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

* * *

(h) Amounts paid specifically — either as advances or reimbursements — for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by

specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

* * *

§31.3306(b)-1 *Wages.*

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

* * *

(h) Amounts paid specifically — either as advances or reimbursements — for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

* * *

§31.3401(a)-1 *Wages.*

(b) *Certain specific items* —

(2) *Traveling and other expenses.* Amounts paid specifically — either as advances or reimbursements — for traveling or other bona fide ordinary and

necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

* * *

(9) *Value of meals and lodging* — The value of any meals or lodging furnished to an employee by his employer is not subject to withholding if the value of the meals or lodging is excludable from the gross income of the employee. See §1.119-1 of this chapter (Income Tax Regulations).

* * *